# No. 7750

# United States Circuit Court of Appeals

For the Ninth Circuit

MUI SAM HUN,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

Appeal from the United States District Court for the Territory of Hawaii.



## BRIEF FOR APPELLANT.

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## BRIEF FOR APPELLANT.

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### I.

### STATEMENT OF THE CASE.

MUI SAM HUN, the appellant, was born in Honolulu (R. pp. 24, 42 and 56) and went to China with his mother when he was four years old (R. pp. 26, 43). Appellant remained in China until his departure on the *S.S. President Coolidge* for Honolulu last July.

He was denied admission by a Board of Special Inquiry, after a fairly lengthy hearing. His appeal to

the Secretary of Labor being unsuccessful, he filed this proceeding in habeas corpus, which resulted in the court refusing to issue the writ and in remanding appellant to the immigration authorities for deportation (R. p. 79).

In order to give better understanding of this proceeding, it will be necessary to quote from the record, perhaps at some length.

Petitioner is thirty-two years old (R. p. 24); born in his parent's home on Hotel Street in Honolulu, May 5, 1902; his father's name was Mui Ow Gut alias Hoo Ung, a farmer by occupation who died in Honolulu when petitioner was two years old. His mother, Jow Shee (R. p. 25) took petitioner to China on the S. S. Mongolia in February, 1906 (R. p. 26).

We will now turn to the testimony of appellant's two witnesses, of whom the Board chairman was constrained to say:

> "It is but fair to state that the testimony of witnesses agrees in practically every detail with that of applicant in describing in detail the meetings they have had."
>
> (R. p. 58.)

It may not be amiss to add the comment that their testimony also agrees in every detail in regard to family history and in almost countless other details.

We quote the following from Lee Wai Shoon's testimony, the first witness (R. p. 42):

> "Q. What do you wish to testify to regarding Mui Sam Hun?

A. I know he was born on Hotel Street, Honolulu, T. H.

Q. How do you know that?

A. I used to know his father.

Q. What was his father's name?

A. Mui Ow Gut; his other name is Mui Hoo Ung.

Q. What was his father's occupation here?

A. He was a vegetable gardener.

Q. What became of him?

A. He died about 30 years ago. He would be 70 years old if he were living.

Q. How many times was Mui Ow Gut married?

A. Once, only, to Jow Shee; I don't know her full name.

Q. What became of Mui Sam Hun and Jow Shee after the death of Mui Ow Gut?

A. She took her son, Mui Sam Hun, to China when he was four years old."

(R. pp. 42 and 43.)

We will now turn to the testimony of the other witness, Wong Wah Heen:

"Q. Who is Mui Sam Hun?

A. The son of Mui Ow Gut.

Q. Who is Mui Ow Gut?

A. A man I knew in Honolulu 30 or 40 years ago.

Q. What other name did Mui Ow Gut have?

A. Mui Hoo Ung.

Q. What was Mui Ow Gut's occupation here?

A. He was a truck gardener.

Q. What became of Mui Ow Gut?

A. He died about 30 years ago in Honolulu.

Q. How old was he when he died?

A. 30 or 40 years old at the time of his death.

Q. Were his remains ever shipped to China?

A. Yes, but I don't know when.

Q. Was this man ever married more than once?

A. Only once.

Q. Describe his wife?

A. Name Jow Shee, 63 or 64 years old; has bound feet; now living at Lung Tow Wan Village, China.

Q. When did she go back to China?

A. At the age of 35 years, I don't know the year.

Q. Who accompanied Jow Shee, if any one, on her return to China?

A. A son, Mui Sam Hun.

Q. Did these people ever have any other children than this one son?

A. No."

(R. pp. 50-51.)

The fact of appellant's birth and departure was further corroborated by a steamship record in possession of the immigration authorities; the outgoing manifest of the *S.S. Mongolia,* sailing from Honolulu February 13, 1906. This manifest (which is in the nature of a secret document for use of immigration officers only) contains the following entry (R. p. 26):

"MRS. MUI; age 35 years; female; occupation wife; destination Hongkong.

SAM HUN; age 4, male, born in Hawaii, destination Hongkong."

Appellant on leaving Honolulu with his mother took up residence in Lung Tow Wan Village, where he continued to reside until 1934 (R. p. 27), when he started back to Honolulu. Both witnesses had made visits to China and the Lung Tow Wan Village, Lee Wai Shoon in 1933 (R. p. 42) and Wong Wah Heen in 1932 (R. p. 49). Both witnesses renewed their acquaintance with appellant and his mother, and the details concerning these reunions were fully and satisfactorily covered in the record (R. p. 58).

Lee Wai Shoon testified that he was visiting at the home of Joe Jow, his friend who resided in the village, who told him that Mui Sam Hun and his mother lived a few houses away (R. p. 44). While he was still at Joe Jow's house, Jow Shee, appellant's mother, called and later led the witness to her nearby home, where he met appellant.

Wong Wah Hoon, who was in the village during his last visit to China (R. p. 52), looked up appellant's mother and visited her, as an old friend (R. p. 37).

Many were the questions asked these witnesses and appellant (R. pp. 35, 37, 52) regarding these meetings, the village and appellant's occupation, the location of his house, etc., etc., and the Board finally acknowledged that their testimony "agrees in practically every detail" (R. p. 58).

## II.

### ERRORS RELIED UPON.

The errors assigned (R. pp. 82-84) are seven in number. In different ways they state the proposition that petitioner, having met the burden of proof cast upon him by the Chinese Exclusion Act, the action of the Board in denying him admission was arbitrary and unfair and, under the circumstances, the refusal of the court to issue the writ was error.

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## III.

### ARGUMENT.

We have seen that appellant's testimony of Hawaiian birth and departure as an infant from Honolulu did not rest upon his own unimpeached and entirely credible testimony but was corroborated by the evidence of two witnesses, Honolulu friends of his parents who in recent years had renewed acquaintance with appellant and his mother in China, and was, moreover, corroborated by an official steamship manifest record, to which appellant and his witnesses could in no way have had access.

On what, then, it will be asked, did the Board base its excluding order? No witness was contradicted or impeached, and obviously appellant proved his case by more than a fair preponderance of the evidence; and yet the Board in the face of the evidence denied appellant admission.

**Assigned Reasons For Denial.**

Why? Two specific reasons were assigned:

(1) That the witnesses, Lee Wai Shoon and Wong Wah Heen, in returning from China in 1933 were asked the usual routine questions by an inspector aboard ship as to whether they had seen any resident or former resident of this country during their recent stay in China; and they had answered, No. Wong Wah Heen stated that he was never asked that question, or if asked he didn't hear it (R. p. 54), and Lee Wai Shoon said he forgot about it (R. p. 46). "I forgot about my steamer ticket also". Of course every Chinese returning from a visit to China in the course of such visit, in Hongkong or Shanghai or the villages, has seen many "residents or former residents of this country." It couldn't be avoided; and it is distinctly unfair to try to use this omnibus slapdash shipboard inquiry against their credibility when later they appear, as a witness for some one their attention was never called to and they did not have in mind when asked the stupid question. If, after a visit to New York and San Francisco, the writer of this brief were asked by an immigration officer as the ship rested at quarantine, to name the "residents or former residents" of Hawaii he had met on the mainland, he would make a sorry mess of it. He would probably do as these Chinese witnesses did and as most of them do, answer in the negative to get the silly business over with as quickly as possible.

"These witnesses", said the Board in dismissing their evidence, "destroyed the effectiveness of their

own testimony, however, by having failed to state that they had seen any such person as appellant on their recent visits to China when questioned on this point aboard ship on their return from their respective visits" (R. p. 58).

There is neither rhyme nor reason to this shocking refusal to give the appellant the benefit of their testimony. One of the witnesses, it will be recalled, said he was never asked the question, or if asked, in the shipboard bustle of docking he did not hear it and the other witness said the matter slipped his mind, as well it might in his eagerness to clear the immigration officers and get ashore. The questions and answers given aboard ship were apparently never shown to the witnesses thereafter nor were they in a calmer moment allowed an opportunity to amplify or correct them, a thing which every requirement of fairness demands, if interrogations of this sort are to be used as the basis for attacking their credibility.

(2) That the witnesses did not recall all the details of testimony they had given in former cases. We submit this is a far-fetched strained effort to discredit testimony. Lee Wai Shoon, who is 60 years old (R. p. 41) was shown a photograph of Lee Tai Soon taken 14 years ago and correctly stated his name, with allowance for variation in spelling (R. p. 46). Then:

> "Q. Do you remember testifying for this man on his arrival from China some years ago?
>
> A. Yes.
>
> Q. What was his father's name?
>
> A. I think it was Lee Sing Chang or Lee Fat Kai."

This apparently being correct, he was shown another photograph.

"Whose photograph is that? (Indicating photo of Leong Tom See in Honolulu file 4382/1868 found on affidavit dated Jan. 13, 1923).

A. That is Leong Tom See.

Q. What was his father's name?

A. I don't remember now.

Q. What was his mother's name?

A. I don't remember that.

Q. How many brothers and sisters did he have?

A. He is the only child in the family.

Q. For your information I will say that the answers you gave to these questions when you were examined in this office on December 12, 1921, were entirely different.

A. I can't remember—it was over ten years ago."

We rise to a point of order as to the accuracy of the statement contained in the last question of the chairman. The witness had correctly stated the man's name, Leong Tom See, had said he could not recall the names of his parents and that Leong Tom See was the only child in the family. There was only one statement of fact in this interrogation which could possibly be wrong, i. e. whether there was more than one child in the family; and we have no way of knowing that that was wrong. If it is a matter relied upon to discredit the witness, it must be in the record not only for the information of the Secretary but also the courts (*Kwock Jan Fat v. White,* 253 U. S. 454, 40 Sup. Ct. 566).

We turn now to the testimony of witness, Wong Wah Heen, on this same subject:

> "Q. Indorsements on your certificate of residence show you have been a witness before this service on numerous other occasions other than those in which you testified for your immediate family; are you able at this time to give the same testimony you gave on the various occasions you have appeared in other nativity cases before this service?
>
> A. I am too aged."
>
> (R. p. 54.)

This takes the policeman's derby as being one of the most stupid questions ever asked by a Board chairman. Certainly, he could not recall at this time all the testimony he had given in other cases, but what witness could? The effrontery of suggesting that he is a perjurer and crook because he answered that question in the way he did! What other truthful answer could he give? If the Board had a suspicion that Wong Wah Heen was a professional witness who had borne false testimony in various cases, the way was open for it to test its suspicions by proper interrogation, but it didn't deign to do so; and it didn't because it knew he was speaking the truth, as was Lee Wai Shoon.

We submit, the Board's refusal to give the evidence of these witnesses any credit, first because on returning from China in 1933 they did not mention having met Mui Sam Hun, and second because of their "admitted inability to recall data concerning other

nativity cases in which they have testified", was arbitrary and unfair and the Board's summary in this respect is false and biased (R. p. 58). Neither witness was asked a question which would warrant any such statement. Wong Wah Heen (R. p. 54) was asked if he could "give the same testimony" given by him on various occasions when he had appeared in other nativity cases. An affirmative answer would have involved a feat of memory, and as Wong had been in the Territory 40 years (R. p. 49) a considerable feat. As for Lee Wai Shoon, he was merely asked how he accounted for his "positive testimony" (R. p. 47) in past cases in which he had appeared as a witness, and he answered that he remembered at the time of giving his testimony the matters covered by his evidence. The point he was trying to make was that the lapse of time plus his advancing years made it difficult to recall in detail testimony he had given from time to time, in cases in which he had appeared as a casual witness. The same, of course, would be true of any other witness under the circumstances, however respectable, when denied an opportunity to refresh his memory. Of the two cases specifically called to his attention (R. p. 46) he did very well, especially considering the facts contained in them had not been called to his attention for from 13 to 11 years. There is no way of knowing what sort of testimony he gave in these cases and whether it was on some slight inconsequential point, or otherwise.

The Board takes the position that a witness has no right to refresh his memory, or, if he does, his tes-

timony is to bear the badge of perjury. Naturally, neither of these witnesses, who, before going to China, had last seen appellant as an infant of four years, would be able to recognize him when grown to manhood, and they didn't claim to; but they did know his mother and re-met appellant in her home, and no doubt the conversations they had with her refreshed their memories to some extent. But at least this can be said: when thus refreshing their memories, it was with no idea of serving as witnesses for appellant; for, of course, if they had gone there to talk matters over with his mother with a view of testifying, the first thing they would have said to the immigration officer in Honolulu quarantine was that in China they had met Mui Sam Hun, and thus pave the way for their subsequent testimony. If these witnesses refreshed their memories, they had a right to do so, a right uniformly accorded all witnesses, without regard to race.

> "The same fairness and impartiality should govern in considering and weighing the testimony of persons of Chinese descent who claim to be citizens of this country, as are given to the testimony of other class of witnesses."
>
> *Ching Hing v. U. S.*, 24 Fed. (2d) 523;

also

> *Yee Chung v. U. S.*, 234 Fed. 126;
> *Wong Mo v. U. S.*, 109 Fed. 888.

**Real Reason For Denial.**

The two reasons assigned and commented on above were in fact only a smoke screen to conceal the real

reason for the action of the Board in denying appellant. This was an unfounded suspicion, utterly unsupported by evidence, which we will now discuss.

"Incidentally" said the chairman (R. p. 57), approaching the discussion of this "reason" "this is the third case of this character presented to this office in the last few weeks in which the exact English date of departure is given of an alleged native who has lived in China for many years. These three cases are parallel in many other particulars, and it would seem to have been prepared by the same source. This last is mentioned in passing without being considered in summing up the evidence."

What chance has an applicant for admission to meet such a poisonous, malevolent statement? Some puzzling rule of vicarious responsibility is invoked against him concerning unnamed cases with which he is in no way identified and the disposition of which remains wholly undisclosed. With almost childish naivete, tongue in cheek, the chairman concluded by disclaiming that the suspicions expressed in the quoted paragraph had been considered by the board members in "summing up the evidence". He did not say, however, that it was not considered by the Board in refusing to credit appellant's testimony and in denying him admission. Why, they considered nothing else; they cared naught for the evidence or anything else but this silly and fantastic notion, which they followed around like three blind men following a dog. It bore no more relation to reality than Edgar Allen Poe's mad dreams. It was inserted into this

record for a specific purpose—and that purpose was to destroy appellant's chance of success on appeal to the Secretary. It rendered the hearing unfair. And an unfair hearing cannot be made fair by cheap disclaimers that prejudicial and improper matters inserted into the record were not considered by the Board in "summing up". Appellant had a right to an orderly hearing conducted "not arbitrarily and secretly, but fairly and openly, under the restraints of the traditions and principles of free government applicable where the fundamental rights of men are involved, regardless of their race or origin" (*Kwock Jan Fat v. White,* supra).

**Court's Erroneous Comment and Opinion.**

In the course of the Judge's decision, he said:

> "It is peculiarly noticeable that the facts *which all particularly remember* are such facts and dates as appear on the outgoing manifest of the *S. S. Mongolia* sailing February 13, 1906." (R. p. 72.)

This statement, with all that it implies, is utterly untrue, and illustrates the point frequently made that a prejudiced administrative hearing inevitably carries its evil influence into court when review is asked.

In the first place the witnesses did not *"all particularly remember"* the facts and dates on the manifest. The witnesses didn't know anything about any dates at all or the ship on which appellant sailed or the time of sailing. While in China one witness, Wong Wah Hoon, was told by Jow Shee that she was 35

when she left here (R. p. 51) and the other witness, who didn't profess to know anything about the woman's age, testified to the boy's age when he left here (R. p. 43). Appellant himself was the only one who testified as to his departure on the *S. S. Mongolia* and the date, and he naturally came here prepared to give this information, always required of returning natives.

The comment of the court also implies that the witnesses did not "particularly" remember anything else but data contained in the manifest, which, of course, is as incorrect as the direct statement, for the witnesses remembered "particularly" a host of things germaine to the inquiry, which even the feverish Board could not attribute to privity with the manifest. They testified "particularly" to the town of appellant's birth, the street, his father's name, occupation, death, removal of body to China, mother's bound feet, her native village, location of her home and various other details too many to enumerate here.

The trial Judge must have been aware that this statement we have quoted was grossly unfair and incorrect. Can it be that he has grown to believe such statements may be made with impunity so long as only Chinese are involved,—that the insistence of appellate courts on the presumption of innocence and good faith, in these cases, is to be taken with a wink and a grain of salt? The Judge blithely presumes fraud, in effect, at least. * * *

The court also makes adverse comment on the inability of appellant to give the years of various hap-

penings (R. p. 71) affecting his life, but when the record is read it will be seen that this is really not so. He, of course, was dealing with the difficult Chinese calendar. The record can speak for itself on this point (R. p. 32).

The court (R. p. 71) stated that the burden of proof in this case is on appellant and he must show *"by clear and convincing proof"*, his right to admission. In this statement, we believe, the court erred. It has been uniformly held that an applicant for admission need make out his case by no more than a fair preponderance of the evidence (2 *C. J.*, 1103; *Woo Jew Dip v. U. S.*, 192 Fed. 471; *U. S. v. Hung Chang*, 134 Fed. 19; *Re Wong Toy*, 278 Fed. 562).

"Clear and convincing evidence" or "clear and satisfactory evidence" as it is sometimes phrased, means

> "a degree of proof greater than a preponderance of evidence, and such as was necessary to establish fraud."
>
> *Chicago, R. I. & P. Co. v. Nebraska State Ry. Com.*, 124 N. W. 477, 85 Neb. 818.

Perhaps the court confused this case with deportation proceedings against a Chinese lawfully admitted by a Board, where fraudulent entry is claimed. Of course, in such cases—or practically any case when fraud is insisted upon—the evidence must amount to "clear and convincing", "clear and satisfactory", or "clear and cogent" proof of the thing alleged. This is elementary.

In *Ex parte Cheung Tung,* 292 Fed. 997, Judge Dietrich in habeas corpus proceedings discharged petitioner saying:

> "* * * fairly weighed the evidence as a whole overwhelmingly supports petitioner's contention of his relationship to Cheung Fu. Were the question a material issue in a criminal case, it is quite inconceivable that, even with the rule of reasonable doubt, a jury would hesitate to so find."

See, also,

*U. S. v. Chu Hung,* 179 Fed. 564;
*Woo Jew Dip v. U. S.,* 192 Fed. 471;
*Johnson v. Damon,* 16 Fed. (2d) 65.

In *Gung You v. Nagle,* 34 Fed. (2d) 848, this court held that the rejection of testimony in that case was arbitrary and improper and ordered the writ to issue. The court made it clear that testimony of Chinese is to be weighed in the same scales as that of other witnesses.

In *Hom Chung v. Nagle,* 41 Fed. (2d) 126, this court considered the case of a Chinese boy who, returning to the United States, was denied admission because of certain discrepancies. In reversing the action of the administrative officers, this court said:

> "The inferences derived from the evidence are overwhelming that the applicant and his father were familiar with the same village and with the same home and family. Discrepancies which existed between them are fairly attributable to the

> frailty of human memory, the method of examination, and the difficulty of language; and do not *fairly indicate* a deliberate conspiracy to obtain a fraudulent entry into the United States *as must be the case if the testimony as to the relationship is false.*"

This thought, that exclusion based upon discrepancies *connotes a finding of affirmative perjury and fraud* on the part of the witnesses not directly attacked or impeached, is stressed in many cases; and it is being, of late, more and more emphasized, that uncontradicted and seemingly persuasive direct evidence of witnesses is not to be lightly termed perjury. And it is directly held, in this same connection, that the "presumption of innocence" applies in these cases with respect to alleged "fabrication of testimony" (*Gung You v. Nagle,* (9th C. C. A.) 34 Fed. (2d) 848, par. 3 of syllabus).

In June, 1929, this court in a given case, held that the conclusion of a Board of Special Inquiry that certain applicants had not established citizenship, which conclusion was based on certain discrepancies in the testimony, was arbitrary and capricious and without any support in the testimony (*Wong Tsick Wye v. Nagle,* (9th C. C. A.) 33 Fed. (2d) 226. See also *Johnson v. Ng Ling Fong,* 17 Fed. (2d) 11; *Nagle v. Ngook Hong,* 27 Fed. (2d) 650; *Gung You v. Nagle,* 34 Fed. (2d) 848; *U. S. v. Day,* 37 Fed. (2d) 36; *Whitfeld v. Hanges,* 222 Fed. 745; *Flynn v. Tillinghast,* 62 Fed. (2d) 308).

In conclusion we respectfully submit that the evidence overwhelmingly established the right of appel-

lant to admission; that there is not a single discrepancy in the whole record, and that the denial of appellant was inspired by bias, prejudice and impalpable suspicion; and the refusal of the trial court to grant the writ and the relief prayed for herein under the circumstances was error which should be rectified on appeal.

Respectfully submitted,

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